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No. 08-895

Supreme Court, U.S.
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In The
Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* CONNECTICUT CONSTRUCTION INDUSTRIES ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By stating that a provider of rail passenger transportation *may* enter into indemnification contracts, 49 U.S.C. § 28103(b), did Congress express a clear and manifest intent to preempt state laws of general applicability that prevent parties to construction contracts from obtaining indemnification for their own negligence?

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INTEREST OF AMICUS CURIAE

The Connecticut Construction Industries Association ("CCIA") is the premier commercial construction industry trade association in the state of Connecticut.[1] Formed almost 40 years ago, CCIA is an association of associations, where all sectors of the commercial construction industry work together to advance and promote Connecticut's construction industry. CCIA strives to "Build a Better Connecticut" and a better quality of life for all citizens of the state. CCIA has 376 members statewide including contractors, subcontractors, suppliers and providers of construction services from all areas of the commercial construction industry. CCIA provides services in the areas of industry relations, labor relations, legislation, education, safety training, safety consulting and loss control, contract documents, public relations and group insurance programs.

CCIA is comprised of nine divisions, ranging from Associated General Contractors of Connecticut, whose members construct commercial buildings owned privately or by the state, to the Connecticut Road

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[1] Counsel of record received timely notice pursuant to Rule 37.2 of CCIA's intention to file this brief. Each party has consented to the filing of this brief and each party's letter of consent has been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, no party authored this brief in whole or in part and no person or entity other than CCIA or its members, or its counsel contributed money to the preparation or submission of the brief.

Builders Association, whose members build our state's transportation systems, to the Utility Contractors Association of Connecticut, which represents the utility contractors who specialize in water, drainage, sewer and water treatment facility construction work. CCIA also has registered professional lobbyists who represent the organization on all state legislation that affects the construction industry.

CCIA closely monitors legal issues that affect the entire construction industry and often offers its perspective in cases raising such issues. The issue in this case is especially significant. This case involves the preemption of the long-standing public policy and law in Connecticut that precludes indemnification in construction related contracts against liability for damages caused by one's own negligence. Accountability for one's own actions at a construction site is not only the public policy in Connecticut, it is the policy in forty-five other states that prohibit in one way or another indemnification for one's own negligence in construction contracts. This case affects all contracts related to construction work performed over, under or near the respondent's vast array of rail lines throughout Connecticut and other parts of the country.

STATEMENT

This case arises out of a tragic accident that occurred during the night of June 16, 2004 in East

Haven, Connecticut. Two Connecticut residents and employees of the petitioner, O&G Industries, Inc., a Connecticut corporation, Gregory Roberts and Peter Quintiliani, were performing repairs on a section of Interstate-95 that passed over railroad tracks owned by the respondent, the National Railroad Passenger Corporation ("Amtrak"), pursuant to an agreement with the State of Connecticut. O&G was required to obtain a temporary permit from Amtrak to enter Amtrak's property to perform the repairs. The permit was a non-negotiable standard form that gave Amtrak exclusive control over all aspects of safety at the site, but contained a provision requiring O&G to indemnify Amtrak, even for Amtrak's sole negligence. All train traffic on those tracks was supposed to have been stopped. However, unbeknownst to the workers and the on-site Amtrak safety personnel, an unscheduled "test train" was making its way down the track towards the worksite while Roberts and Quintiliani were suspended under a bridge and over the railroad tracks in a manlift. By the time the test train engineer saw the construction site it was too late for him to stop the train. The train slammed into the manlift on which the employees were working, killing Roberts and injuring Quintiliani.

Quintiliani and Roberts' estate sued Amtrak in the United States District Court for the District of Connecticut. Amtrak admitted liability and a jury ultimately awarded the claimants in excess of $1 million each. Amtrak then sought indemnification for the sums paid to the claimants from O&G pursuant

to the indemnification provision contained in the permit.

In this case, the United States Court of Appeals for the Second Circuit upheld the district court's granting of summary judgment in favor of Amtrak on the grounds that 49 U.S.C. § 28103(b) preempts application of Conn. Gen. Stat. § 52-572k because application of the Connecticut statute would violate the plain language and spirit of § 28103(b). (Petitioner's App. 1-33) That is, the district court determined that the provision of § 28103(b) that permits Amtrak to enter into agreements allocating financial responsibility for claims preempts the Connecticut statute that prohibits, as a matter of public policy, provisions in certain construction contracts that purport to indemnify a party against its own negligence. (Petitioner's App. 34-47) Because forty-six states have enacted anti-indemnity statutes in some form or another, the Second Circuit's decision in this case is of national significance.

SUMMARY OF ARGUMENT

By the decision below, the Second Circuit has expanded the sweep of preemption to a situation where it simply did not apply. In doing so, it overlooked significant public policies and Connecticut statutes. In particular, the policies embodied by the various anti-indemnity statutes will be diluted if those statutes are deemed inapplicable to Amtrak,

because allowing a shifting of financial responsibility in the manner presented in this case creates precisely the "moral hazard" that the courts were intended to avoid. Allowing the decision to stand not only circumvents courts' intentions from being encouraged carelessness on the part of Amtrak, which may endanger residents of Connecticut and the city at large. It also unfairly burdens any entity required to obtain a temporary permit for work near Amtrak's rail lines because of discrepancies in their bargaining position. Entities doing business with Amtrak will be forced to accept financial responsibility for Amtrak's negligence even where the underlying injuries are caused by Amtrak's negligence. Moreover, allowing the decision to stand may shift financial responsibility for a loss to a party who did not do cover by insurance and may not be able to pay because they unwittingly assumed responsibilities they believed were against the law. This would not only allow Amtrak to avoid responsibility for its negligence, but may also leave an injured party without any recourse for recovery.

In addition to undermining the policies embodied by anti-indemnity statutes, the decision below undermines Connecticut's comparative negligence and workers' compensation schemes. In particular, Connecticut's workers' compensation statute, like its comparative negligence statute, reflects the principle that the negligent party is the party that should bear the cost of damages to the fullest extent possible.

Under the circumstances presented in this case, these safeguards schemes are turned on their heads: an employer with no liability whatsoever (O&G) is not only obligated to compensate its injured employees in accordance with the law but, moreover, it is obligated to indemnify the fortfessor (Amtrak) for the damages the fortfessor paid to the injured employees. This result is contrary to the principles of holding fortfessors liable for their negligence and only to the extent of their negligence.

Finally, the Second Circuit's position in this case has serious practical consequences for citizens and in particular, members of the construction industry, throughout the country. Accordingly, the petition should be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES PRESENTED IN THIS CASE ARE OF NATIONAL SIGNIFICANCE AND AFFECT VARIOUS PRINCIPLES OF STATE LAW IN VIRTUALLY ALL FIFTY STATES

This case presents a legal question of great significance to the construction industry and to the public generally. Every day, throughout the country, there are thousands of construction projects underway in various stages of completion. These projects involve multiple contractual arrangements setting

forth the duties and obligations of the various entities involved in the project – landowners, design professionals, general contractors, subcontractors, and bonding agencies. Customarily, these contracts typically contain provisions allocating responsibility among the parties for liabilities that may arise in the course of the project. Forty-six states have seen fit to prohibit parties to construction contracts from absolving themselves of financial responsibility for their own negligence, to one extent or another, through the enactment of so-called "anti-indemnity statutes" – Connecticut is one of these states.[3] Yet, by its decision

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[3] Alaska Stat. § 45.45.900 (2008); Ariz. Rev. Stat. § 34-556 (2008); Ark. Code Ann. § 4-56-101 (2008); Cal. Civ. Code § 5715 (2008); Colo. Rev. Stat. § 13-20.5-101 (2008); Conn. Gen. Stat. § 52-572K (2008); Del. Code Ann. tit. 6, § 2704 (2008); Fla. Stat. § 725.06 (2008); Ga. Code Ann. § 13-8-2 (2008); Haw. Rev. Stat. § 431:10-222 (2008); Idaho Code Ann. § 29-114 (2008); 740 Ill. Comp. Stat. Ann. 35/1 (2008); Ind. Code Ann. § 26-2-5-1 (2008); Kan. Stat. Ann. § 16-121 (2008); Ky. Rev. Stat. Ann. § 371.180 (2008); La. Rev. Stat. Ann. § 9:2780 (2008); Md. Code Ann., Cts. & Jud. Proc. § 5-401 (2008); Mass. Gen. Laws ch. 149, § 29C (2008); Mich. Comp. Laws Serv. § 691.991 (2008); Minn. Stat. § 337.05 (2008); Miss. Code Ann. § 31-5-41 (2008); Mo. Rev. Stat. § 434.100 (2008); Mont. Code Ann. § 1 8-2-121 (2007); Nep. Rev. Stat. § 52-51.187 (2008); Nev. Rev. Stat. Ann. § 616B.030 (2008); N.H. Rev. Stat. Ann. § 338-A:1 (2008); N.J. Rev. Stat. § 2A:40A-1 (2008); N.M. Stat. Ann. § 56-7-1 (2008); N.Y. Gen. Oblig. Law § 5-322.1 (2008); N.C. Gen. Stat. § 22B-1 (2008); N.D. Cent. Code § 9-08-02.1 (2008); Ohio Rev. Code Ann. § 2302.31 (2008); Okla. Stat. tit. 15, § 221 (2008); Or. Rev. Stat. § 30.140 (2007); 68 Pa. Cons. Stat. § 491 (2008); R.I. Gen. Laws § 6-34-1 (2008); S.C. Code Ann. § 32-2-10 (2007); S.D. Codified Laws § 56-3-18 (2008); Tenn. Code Ann. § 62-6-123 (2008); Tex. Civ. Prac. & Rem. Code Ann. § 130.002 (2008); Utah Code Ann. § 13-8-1 (2008); Va. Code Ann.

(Continued on following page)

below, the Second Circuit has relegated the significant public policies rendering these statutes to the sidelines in favor of finding an implied intent by Congress to preempt these policies and, more importantly, to essentially exempt Amtrak from these public policies.

The anti-indemnity statutes are in line with both state and federal common law where contract provisions that violate public policy are deemed invalid. It is contrary "violates some explicit public policy [a contract] is applied to refrain from enforcing it." W.R. Grace & Co. v. Local Int'l Union of United Rubber Workers, 461 U.S. 757, 766 (1983). "Such a public policy, however, must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Id. (citation and quotation marks omitted). Contracts "which are detrimental to the interests of the public as understood at the time" are invalid as against public policy. Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233 (1892). See also Blake D. Morant, Contracts Limiting Liability: A Paradox with Tacit Solutions, 63 TUL. L. REV. 717, 734-737 (1989) (hereinafter "Morant,"). This is especially pertinent to indemnity agreements that affect a public interest or duties that involve the public.

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§ 11-4.1 (2008); West. Rev. Code Ann. § 4.24.115 (2008); W.Va. Code R. § 22-8-14 (2008); Wis. Stat. § 895.447 (2008); Wyo. Stat. Ann. § 30-1-131 (2008).

Amtrak is a common carrier whose duties affect the public across the country. Common carriers "in the course of conducting their public function generally cannot insulate themselves from the consequences of their negligence." Morant, supra, at 147-48. See Railroad Co. v. Lockwood, 84 U.S. 357, 386 (1873). See also Biggo v. Inland Waterways Corp., 349 U.S. 85, 88-89 (1955) (tug boat operators). Congress has declared that the policy of the United States government in regulating the railroad industry, among other things, is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. This clearly stated purpose preceded and was not affected by 49 U.S.C. § 28103. The Second Circuit's interpretation of § 28103 allowing Amtrak to be indemnified for its own negligence does not promote safety near railroads in Connecticut or anywhere in the United States.

The reasons why the Second Circuit was wrong to find Conn. Gen. Stat. § 52-572k preempted by § 28103(b) have been thoroughly and ably explained in the Petition for a Writ of Certiorari filed by ORC and will not be augmented herein. CCIA believes, however, that additional explication of the state law principles and public policies at issue, as well as the effects of the underlying decision on the construction industry generally, is warranted.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION ADVERSELY AFFECTS THE CONSTRUCTION INDUSTRY BY VITIATING THE APPLICABILITY OF CERTAIN STATE LAW PRINCIPLES TO CERTAIN CONSTRUCTION CONTRACTS

A. Historical Background And Principles Behind Anti-Indemnification Statutes

States began enacting anti-indemnification statutes in the 1960s in response to the inclusion of indemnification provisions in standard construction contracts promulgated by the American Institute of Architects and the National Society of Professional Engineers. 4 STEVEN G.M. STEIN, CONSTRUCTION LAW, ¶ 13.21[3] (2008) (hereinafter "STEIN"). Generally, those provisions required contractors to indemnify architects or engineers against damage caused in whole or in part by the negligence of the contractor or his agent. Id. Concerns arose out of fears that smaller contractors would be unable to procure insurance to protect against the liability posed by those indemnification agreements or that the cost of insurance would be prohibitive. Id. Many contractor associations petitioned their state legislators to pass some form of the anti-indemnification statutes that exist today. Id. A broad range of indemnity statutes exist across the country. The form, scope, and application of these statutes vary greatly, ranging from statutes that void statutes rendering against acts known to be negligent at the time the act is done, to statutes

voiding agreements that indemnify against the sole negligence or negligence of the party receiving indemnification. See generally, Allen Hold Gwyn & Perl E. Davis, Fifty States Survey of Anti-Indemnity Statutes and Related Caselaw, 53 CONSTR. LAWYER 58 (Summer 2003).

The fact that the vast majority of states have adopted an anti-indemnity statute in some form or another, demonstrates a nearly *unanimous* public policy that, in some circumstances, parties to construction contracts should not be permitted to obtain indemnification for their own negligence. Courts have upheld these statutes, recognizing that they are instrumental in the maintenance of safe workplaces for employees. See, e.g., McMunn v. Hertz Equip. Rental Corp., 167 F.3d 88, 92 (1st Cir. 1998) (purpose of Indiana anti-indemnity statute is to increase safety on construction sites) (citing Fort Wayne Corrugating v. Indiana & Michigan Electric Co., 443 N.E.2d 883 (Ind. App. 1983)); Caldwell v. Gulf Oil Co., 670 F.Supp. 636, 676 (N.M.1983) (interpreting New Mexico anti-indemnity statute as prohibiting indemnitee from contracting away liability for its own percentage of negligence and finding that statute promotes workplace safety and freedom of contract). See also STEIN, supra, at ¶ 13.17[3][b]. Stated differently, the idea is that "[a] party that knows it will not be financially responsible has little incentive to take any preventive measures to ensure its negligence does not hurt a third party." Trisha Stroge, From the Bottom of the Food Chain Looking Up: Subcontractors and the Evil

Cost of Additional Insured Endorsements, 52 CONSTR. LAWYER 51 (Summer 2008). Additionally, "these arrangements are believed to compel overreaching in the construction industry where small contractors and suppliers are often powerless to fully negotiate an allocation of risk through indemnity agreements." Stein, supra, at ¶13.11[5][b]. See also Jamres v. Burlington Northern Santa Fe Ry. Co., No. CV02-4108-PCT-NVW, 2005 U.S. Dist. LEXIS 63581 at *51 (D. Ariz. Aug. 25, 2005) (citing 3 Philip L. Bruner and Patrick J. O'Connor, Bruner and O'Connor on Construction Law, § 10:9 (2005) (attributes "acquire more equitable distribution of costs and risk of injury in the construction industry where disparities in bargaining power are common, and misfortune is rarely the fault of one party alone")).

Furthermore, "[w]hen challenged, anti-indemnification statutes have been upheld as valid and not violative of any constitutional right of due process," equal protection or the impairment of contracts." Stein, supra at ¶13.11[5][b] (footnote omitted). Courts have upheld these statutes on two grounds. "First, these statutes are construed as evidencing an intent to insure that persons in the construction industry maintain an incentive to provide a safe workplace for employees." Id. "The courts reason that allowing a contractor, owner, or architect to be free from liability for his own negligence reduces the incentive to safely operate the workplace." Id. "Second, these statutes are believed to compel overreaching in the construction industry where small

contractors and suppliers are often powerless to truly negotiate an allocation or risk through indemnity agreements." Id. "Thus, the courts conclude that the firm public policy goals of encouraging safety and eliminating "unconscionable" contract provisions outweigh the normal right of private individuals to contract as they see fit." Id.

B. The Policies Embodied By The Various Anti-Indemnity Statutes Will Be Undermined If Those Statutes Are Deemed Inapplicable To Amtrak

The underlying principles polstered by the various anti-indemnity statutes are generally the same – one such-indemnity agreement working to allevigation of the promises to engage personal pergaining power between the parties to construction contracts. The effect of the Second Circuit's decision is to exempt Amtrak from the ambit of these statutes and their attendant public policies, while nonetheless otherwise applecting Amtrak to apply cable state contract law. (Ref. at 08-18) Allowing the decision to stand results in significant dilution and undermining of the two (and virtually numerous) policy goals of increasing workplace safety and alleviating the burdens of disparate pergaining power between parties to construction contracts.

In particular, the underlying decision, it allowed to stand, will undermine the public policies of those states in which Amtrak owns property and that have

adopted anti-indemnity statutes. Connecticut and all states enjoy state police powers to protect "the safety, health, morals and general welfare of the public" within their respective borders. Lochner v. New York, 198 U.S. 45, 53 (1905). This power includes preventing individuals from making certain contracts which the state deems are against public policy. Connecticut exercised its police power by enacting Conn. Gen. Stat. § 53-257K to preclude parties from indemnifying against liability for another's negligence in construction related agreements.

It is also a bedrock principle of tort law that "every person has a duty to use reasonable care not to cause injury to those who may be reasonably could foresee to be injured by his negligent conduct," whether that conduct consists of acts of commission or omission." Gazo v. City of Stamford, 765 A.2d 505, 508 (Conn. 2001). The duty to use care "may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." Id. (citation and quotation marks omitted). Further, with respect to premises, the duty of a property owner to maintain premises in a reasonably safe condition is nondelegable. Smith v. Town of Greenwich, 888 A.2d 263, 272 (Conn. 2005). Negligence is defined by making parties pay for their negligent acts or omissions.

The core purpose behind anti-indemnity legislation is to make all parties at a construction site

responsible for the consequences of their own negligence. This minimizes the "moral hazard" where a party who is indemnified may use less care to avoid injury or loss because the indemnified party is not liable for its own actions. See Samir B. Mehta, Additional Insured Status in Construction Contracts and Moral Hazard, 3 CONN. INS. L. J. 183, 187-188 (1996/1997). This carelessness could result in more accidents on the worksite that could have been avoided. By prohibiting indemnification for another's negligence, the public is better protected from the dangers and consequences of unsafe or poor quality construction. When held accountable, parties are incentivized to exercise a higher degree of care. Indemnity removes this incentive.

If the extent indemnity agreements which indemnify against another's negligence are not outlawed, they generally are not favored by reviewing courts. Such provisions are strictly construed to ensure that they express the intent to indemnify in clear and unequivocal language. "A contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." United States v. Seckinger, 396 U.S. 203, 211 (1970). "This principle, though verbally articulated, is accepted with virtual unanimity among American jurisdictions." Id. Contract, in particular, does not favor contract provision that purport to relieve a person from his own negligence. Hanke v. Tompet Kirby Restaurant Corp.,

888 A.2d 747, 745 (Conn. 2005). This is so "because exculpatory provisions undermine the policy considerations governing our tort system." Id. As articulated by the Connecticut Supreme Court, those policy considerations include "compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm. . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer." Id. (citation and quotation marks omitted). These principles are further reflected in the legislative history of Conn. Gen. Stat. § 52-572k. During the floor debate, Representative Frankel noted that it is contrary to fair principles of law to give a party a license to act negligently. (Petitioner's App. 182)

There, it is only in the most clear of circumstances that exculpatory contract provisions will be recognized. Here, where an exculpatory provision is protected by statute, the public policy arguments against such provisions are even stronger. The Second and Circuit's decision overlooks these significant points.

C. The Policies Underlying Connecticut's Anti-Indemnity Statute Are Also Reflected in Connecticut's Comparative Negligence Law

The policies embodied by anti-indemnity statutes are also enforced with the concept of comparative negligence adopted in Connecticut: i.e., that parties should be held financially responsible for their own negligence, but not that of another. Conn. Gen. Stat. §§52-572h. The Connecticut legislature passed the Tort Reform Act embodied in §§52-572h in the mid 1980s "in response to rapidly rising insurance rates, which, some believed would be curtailed if tort liability could be limited and systemized. . . . As finally enacted the act represents a complex web of interdependent concessions and pairings struck by hostile interest groups of opposing philosophical positions." Sansone v. Board of Police Comm'r, 228 A.2d 516, 517 (Conn. 1967).

Section 52-572h(c) provides in relevant part as follows: "In a negligence action to recover damages resulting from personal injury, wrongful death or damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages . . . ."

Conn. Gen. Stat. § 52-572h(c) (emphasis added).[5] The statute includes a provision that it does not impair any right to indemnity "under existing law." Id. Accordingly, the comparative negligence statute only deters to indemnity agreements permitted by law. Indemnity agreements prohibited by Conn. Gen. Stat. § 52-572k are not permitted by law and therefore are not saved by this suspension.

Thus, the principles *underlying* comparative negligence (holding parties liable only for their own negligence) overlap with the principles *underlying* Connecticut's anti-indemnity statute (promotion of workplace safety by holding parties liable for their own negligence, among others). Therefore, these bodies reflect the principle that, in the absence of clear and "unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts." Hanks, 288 A.2d at 637 (citation omitted).

Here, the situation is even more stark – § 52-572k mandatorily voids certain exculpatory provisions in certain construction contracts. Stated another way, the Connecticut legislature, like almost all of its sister legislatures, has determined that certain exculpatory provisions in certain construction contracts should simply be void, eliminating the need for

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[5] The statute also permits reallocation of damages when damages are uncollectible from a liable defendant. Conn. Gen. Stat. § 52-572h(g).

court analysis of the intent manifested by the parties to the contract, or consideration of public policy concerns.

D. Permitting Amtrak To Receive Indemnification Would Undermine Connecticut's Workers' Compensation Scheme

Allowing Amtrak to obtain indemnification in these circumstances (that is, where Amtrak would be indemnified for its own negligence) also runs contrary to Connecticut's workers' compensation scheme, in that Connecticut employers are normally permitted to seek reimbursement from third parties who cause injuries to employees in the course of their employment. *See* Conn. Gen. Stat. § 31-293(b). Here, the exact opposite will occur: the party responsible for the employee's injury will receive indemnification from the employer, a result completely contrary to that contemplated by Connecticut's statutory workers' compensation scheme.

Conn. Gen. Stat. § 31-293(a) provides that the employer of an injured employee "having paid, or having become obligated to pay, compensation under the provisions under this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee." The statute further provides that if the employer and the employee are joined as plaintiffs in an employee's lawsuit against a tortfeasor, "and any damages are recovered, the

damages shall be so apportioned that the claim of the employer, as defined in the section, shall take precedence over that of the injured employee and the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorney's fees, incurred by the employee in effecting the recovery." *Id.* In other words, the employer of an employee injured as a result of a third party's actions has a priority claim to any damages recovered from the third party, after deduction of reasonable and necessary expenditures, in order to make the employer whole.

This statute, like Connecticut's comparative negligence statute, reflects the principle that the negligent party is the party that should bear the cost of damages to the fullest extent possible. That is, while employers are obligated to pay workers' compensation benefits, they are also given the opportunity to be made whole when an employee's injuries are caused by a third party. Under the Second Circuit's decision, however, this statutory scheme is turned on its head: an employer with no liability whatsoever (O&G) is not only obligated to compensate its injured employees in accordance with the law but, moreover, is obligated to indemnify the tortfeasor (Amtrak) for the damages the tortfeasor paid to the injured employees. The Second Circuit failed to recognize that this result is contrary to the principles of holding tortfeasors liable for their negligence and only to the extent of their negligence.

CONCLUSION

At bottom, the Second Circuit expanded the sweep of preemption to a situation where it simply did not apply. In doing so, it overlooked significant public policies and Connecticut statutes. Moreover, the Second Circuit's position has serious practical consequences for citizens, and in particular, members of the construction industry, throughout the country. Accordingly, the petition should be granted.

Respectfully submitted,

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